[Case Title]C.J. Rogers, Grabscheid v W.P.M., Defendant
[Case Number]91-20388
[Bankruptcy Judge]Arthur J. Spector
[Adversary Number]94-3179
[Date Published]March 25, 1996

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

In re: C.J. ROGERS, INC.,

Case No. 91-20388
Chapter 7

Debtor.
_____/

WILLIAM H. GRABSCHEID, Trustee,

Plaintiff,

-v- A.P. No. 94-3179

W.P.M., INC.,

Defendant.
_____/

**OPINION REGARDING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

## INTRODUCTION

On March 7, 1996, the Defendant filed a Motion For Partial Summary Judgment. The subject of the motion is a $250,000 payment from the Debtor to the Defendant, which was made by means of a check dated and delivered to the latter on January 30, 1991. The Defendant claimed that this payment is immune from attack under §547(b) because it did not constitute a "transfer" for purposes of that statute. Alternatively, it argued that avoidance is precluded by §547(c)(4)'s "new-value" defense. Neither of these arguments is persuasive.

## DISCUSSION

### 1. No-Transfer Argument

Section 547(b) permits the trustee to "avoid any transfer of an interest of the debtor in property" if it meets various criteria enumerated in that statute. 11 U.S.C. §547(b) (emphasis added). The highlighted term "means every mode . . . of disposing of or parting with property or with an interest in property." 11 U.S.C. §101(54).

In asserting that the Debtor's payment was not a transfer, the Defendant points to the fact that on the date the Debtor's check was honored--February 4, 1991--the Defendant gave the Debtor a check of its own in the amount of $249,900. It seems that this latter check, which was also honored on February 4, was to serve as an advance for construction services to be performed by the Debtor for the Defendant's benefit. See Affidavit of Christopher Genung at ¶14. The Defendant was apparently willing to do this because the "loaned" funds were in effect immediately repaid to it when the drawee bank honored the Debtor's $250,000 check. See Affidavit of Norma Stites at ¶12 ("The . . . [$250,000] Check would have been written against insufficient funds but for the deposit of the . . . [$249,900] Check into the . . . account which the . . . [$250,000] Check was written against . . . ."); Defendant's Brief at p. 5 ("C.J. Rogers . . . was cash poor . . . [and therefore] was not in a position to pay WPM for the past due accounts receivable[.] [B]ut [C.J. Rogers] was in a position to perform subcontract work[.] [Thus] C.J. Rogers submitted to WPM the [$250,000] Check, which was applied to . . . past due accounts

receivable. WPM then in turn wrote the [$249,900] Check back to C.J. Rogers[,] which was booked as a pre-payment . . . for the mobilization of equipment for a WPM project in Indiana.").

The rationale for the Defendant's contention that no transfer occurred is rather mysterious. It appears to be premised on the theory that the payments to and from the Debtor cancel one another out (i.e., for all but $100 of the $250,000 in question). See id. at p. 8 (". . . WPM received nothing of value. It received a check for $250,000 only because it wrote a check back in the amount of $249,900 to permit that $250,000 to be paid.").

It may well be true that the net effect of the check exchange was that the Debtor paid the Defendant the sum of only $100. But one can draw this conclusion only by taking into account what the Debtor obtained from the Defendant--namely, the $249,900 payment. And unfortunately for the Defendant, the existence vel non of a "transfer" does not turn on what is received: Rather, the quoted term is defined solely with reference to what is conveyed. See supra p. 2; In re Brajkovic, 151 B.R. 402, 406 n.7 (Bankr. W.D. Tex. 1993) ("[T]he definition of 'transfer' in the Bankruptcy Code focuses on the property leaving the debtor . . . ."). Thus it would make no difference if, as its motion suggests, the Defendant in effect paid most of the $250,000 right back to the Debtor.[1]

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[1]Of course, the extent to which a debtor receives consideration or value of some kind from a creditor may be significant in other respects. For example, the trustee cannot use §547(b) to avoid a transfer which is part of a "contemporaneous exchange" under §547(c)(1). But as the latter statute implicitly recognizes, the debtor's transfer is still a transfer: it simply is one which is insulated from attack by the trustee.

In a not-very-successful attempt to explicate its "no-transfer" theory, the Defendant filed a supplemental pleading in which it cited In re Centonella, 142 B.R. 624 (Bankr. N.D. N.Y. 1992), for its assertion "that setoffs are not preferences." Defendant's Reply Brief at p. 5. That case does indeed state that "a setoff is . . . not avoidable as a preference under Code § 547," reasoning that such matters "are governed exclusively by Code § 553." Centonella, 142 B.R. at 627. And the latter statute lends support for this contention, inasmuch as it indicates that, "[e]xcept as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor . . . against a claim of such creditor against the debtor." 11 U.S.C. §553(a). But the Defendant's line of reasoning is fatally flawed.

"'[S]etoff' . . . involve[s] the use of a counterclaim--i.e., the assertion by a party of a claim that it holds as a means of reducing the amount of a claim asserted against it." In re Thompson Boat, A.P. No. 94-2072, at 17 (Bankr. E.D. Mich. Jul. 11, 1995) (unpublished). The Defendant suggested that that is what happened here, arguing that it and the Debtor "agreed to set-off C.J. Rogers' liability in the accounts receivable against WPM's liability for the advance payment that it would owe . . . C.J. Rogers for mobilization of equipment on the . . . [construction] project." Defendant's Reply Brief at p. 5.

This argument reveals either a fundamental misunderstanding of the setoff concept or, worse, an outright attempt to distort the facts as presented by the Defendant itself. Even if one makes the rather generous assumption that the Defendant "owed"

$249,900 to the Debtor, so that there were in fact cross-liabilities (a prerequisite for setoff), there is nothing by way of evidence which indicates that either the Defendant or the Debtor purported to credit the obligation owed to it against its own obligation. To the contrary, the evidence points to the conclusion that these parties chose to discharge their respective liabilities by means of the checks which they exchanged. See, e.g., Affidavit of Norma Stites ¶8 ("The . . . [$250,000] Check was to be applied to past due accounts payable due WPM from C.J. Rogers . . . ."); id. at ¶11 ("The . . . [$249,900] Check was made to C.J. Rogers as a prepayment for mobilization of equipment . . . ."). And the Defendant's original brief reinforces this conclusion. See Defendant's Brief at p. 5 (quoted supra pp. 2-3).

Thus there is no reason to believe--let alone make a finding of "no genuine issue," see F.R.Civ.P. 56(c) (incorporated by F.R.Bankr.P. 7056)--that a setoff occurred. In fact, the Defendant's own supporting documentation implicitly concedes that this case does not involve a setoff. See, e.g., Affidavit of Christopher Genung at ¶5 ("At times the reciprocal receivables and payables were set-off against one another and on other occasions checks were written between WPM and C.J. Rogers to satisfy the accounts.").

There is another rather basic problem with the Defendant's setoff argument. The proposition that setoffs are not subject to avoidance under §547(b) simply does not speak to the issue at hand--which is whether the $250,000 payment constitutes a transfer. By implying that it does, the Defendant only muddles the analysis.

For these reasons, I reject the contention that no transfer occurred.

**2. New-Value Argument**

A creditor may be able to defeat a §547(b)-based avoidance action "to the extent that, after . . . [the challenged] transfer [was made], such creditor gave new value to . . . the debtor." 11 U.S.C. §547(c)(4). The Defendant argued that for purposes of §547(c)(4), its $249,900 payment to the Debtor occurred "after" the $250,000 transfer, because the latter transfer must be deemed to have taken place on January 30, when the Debtor's check was delivered. See Defendant's Brief at pp. 9-13. The Plaintiff argued in response that the transfer was made on February 4, the date the check was honored, and that the $249,900 payment was therefore made before the $250,000 transfer. See Plaintiff's Brief at pp. 9-12.

In assessing the respective merits of these competing time-of-transfer theories, a logical starting point is Barnhill v. Johnson, 503 U.S. 393 (1992). There the Supreme Court ruled that, when a debtor makes payment by check, a "transfer" of its property interest in the checking account does not occur for purposes of §101(54) until the check is honored. As pointed out by the Defendant, the Court limited this holding to matters requiring the application of §547(b), "express[ing] no view[]" on the soundness of the "unanimous . . . conclu[sion among the Courts of Appeals which addressed the issue] that a date of delivery rule should apply to check payments for purposes of § 547(c)." Id. at 402 n.9. Thus Barnhill is not dispositive.

With these considerations in mind, I think the issue can fairly be stated as this: With respect to check payments, did Congress intend that the time of transfer be defined differently under §547(c) (specifically, §547(c)(4)) than it is under §547(b)?

Although it is not dispositive, Barnhill's significance vis-a-vis the issue before me is substantial. The Court itself has on more than one occasion recognized the "'rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" Commissioner v. Lundy, 516 U.S. ___, 116 S.Ct. 647, 133 L.Ed.2d 611, 626 (1996) (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)). And for a couple of reasons, this common-sense proposition carries particular force here.

First, the text of the Bankruptcy Code indicates that the term "transfer" carries the same meaning throughout. See 11 U.S.C. §101(54) ("In this title-- . . . 'transfer' means . . . ." (emphasis added)); 11 U.S.C §103(a) ("[C]hapter[] 1 [which includes §101(54)] appl[ies] in a case under chapter 7, 11, 12, or 13 of this title.").

Second, the provisions at issue in Barnhill (§547(b)) and in this case (§547(c)) are not only "parts of the same act"; they constitute sub-parts of a single statute, a statute which gives no indication in its text that "transfer" means different things in its various sub-paragraphs.

The Defendant cited four post-Barnhill cases which invoked the date-of-delivery rule under §547(c). In justifying this outcome, several quote or allude to the following passage from the Supreme Court's opinion:

> [P]etitioner . . . points to identical statements from Representative Edwards and Senator DeConcini that "payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of sections 547(c)(1) and (2)," 124 Cong Rec 32400, (1978) and id., at 34000 . . . . But . . . the[se]

> statements . . ., by their own terms, apply only to § 547(c), not § 547(b). Section 547(c), in turn, establishes various exceptions to § 547(b)'s general rule permitting recovery of preferential transfers. Subsection (c)(1) provides an exception for transfers that are part of a contemporaneous exchange of new value between a debtor and creditor; subsection (c)(2) provides an exception for transfers made from debtor to creditor in the ordinary course of business. These sections are designed to encourage creditors to continue to deal with troubled debtors on normal business terms by obviating any worry that a subsequent bankruptcy filing might require the creditor to disgorge as a preference an earlier received payment. But given this specialized purpose, we see no basis for concluding that the legislative history explicitly confined by its own terms to § 547(c), should cause us to adopt a "date of delivery" rule for purposes of § 547(b).

Barnhill, 503 U.S. at 401-402. See Jones v. Aristech Chemical Corp., 157 B.R. 720 (N.D. Ga. 1993); In re National Ent., Inc., 174 B.R. 429 (Bankr. E.D. Va. 1994); In re Transport Assocs., 171 B.R. 232 (Bankr. W.D. Ky. 1994); In re George Worthington Co., 163 B.R. 115 (Bankr. N.D. Ohio 1994).

A real problem with this analysis is that Barnhill ruled that it was inappropriate to consult the legislative history for purposes of resolving the issue before it. See Barnhill, 503 U.S. at 401 (“[A]ppeals to statutory history are well-taken only to resolve 'statutory ambiguity.' . . . . [T]his is [not] such a case." (citation omitted)). Since the meaning of "transfer" under §547(b) was deemed by the Court to be sufficiently unambiguous to warrant resort to this so-called "plain meaning rule," it certainly seems reasonable to assume the Court would do likewise were it to be presented with the issue of that same term's meaning under §547(c).

This position is supported by In re Belknap, Inc., 909 F.2d 879 (6th Cir.

1990). There the Sixth Circuit ruled "that 'transfer' of a check occurs upon delivery from debtor to creditor." 909 F.2d at 884. Since the court was construing §547(b), this holding was of course abrogated by Barnhill. However, what was not overruled by Barnhill was Belknap's other holding "rejecting the . . . argument that different rules for check transfers should apply to subsections (b) and (c) of section 547." 909 F.2d at 883. The court explained:

> There is no persuasive reason for giving the word “transfer” a different meaning under the two subparts of section 547. The policy of section 547(b) is to set aside transfers that potentially prefer selected creditors; section 547(c), in turn, defines groups of creditors who are excepted. To give the word “transfer” a different meaning in these complementary subparts seems inconsistent, unworkable, and confusing. See Ellis, Preferential Payments by Check: At What Point Is Payment Made?, 16 U.C.C.L.J. 46, 57 (1983)(“The application of two separate tests to such similar questions is illogical.”).

Id.

One could argue that, since the Sixth Circuit adopted the proposition (albeit, perhaps, in dictum) that the date-of-delivery rule applies to §547(c), and since Barnhill explicitly declined to address the soundness of that proposition, Belknap calls for the application of the date-of-delivery rule. Indeed, one panel of the Sixth Circuit held, post-Barnhill, that the date of transfer for §547(c)(4) purposes is the date of delivery. See Still v. Fruehauf, 1 F.3d 1242 (Table), opinion can be found at 1993 WL 264679, at *5 (6th Cir. Jul. 13, 1993) (unpublished) ("The Barnhill Court specifically distinguished §547(b) from §547(c) . . . . Accordingly, we find no error in the district court's decision affirming the bankruptcy court's ruling that the date on which Fruehauf received checks from Southwest is the date which constitutes a transfer under §547(c)."). But because this opinion is

unpublished, it is not binding precedent. Its use is limited to "establishing res judicata, estoppel, or the law of the case." Sixth Circuit Rule 24(c). See Easley v. Pettibone Michigan Corp., 990 F.2d 905, 907 n.2 (1993). And since the opinion doesn't even mention Belknap, it offers no support for the view that Belknap directs courts to use the date of delivery for §547(c) purposes.

While I agree that there is some logic supporting a date-of-delivery rule under §547(c)(4), I think that in the wake of Barnhill and Belknap, application of that rule is foreclosed.

Another impediment to summary judgment as to this check is that, as far as can be determined, the only consequence of the check exchange was that the Debtor replaced old obligations--accounts payable to which the $250,000 check was applied--with a new one, the $249,900 advance from the Defendant. Indeed, the Defendant seemed to concede as much. See Defendant's Brief at p. 6 ("This . . . [was] simply a wash transaction where an old C.J. Rogers account payable . . . [was] exchanged for a new C.J. Rogers account payable.").

While one may permissibly conclude from the evidence presented by the Defendant that the Debtor received "new value" when it took the Defendant's $249,900 check, the evidence does not lead to only that conclusion. See 11 U.S.C. §547(a)(2) ("'[N]ew value' . . . does not include an obligation substituted for an existing obligation[.]"); cf., e.g., In re Spada, 903 F.2d 971, 976 (3d Cir. 1990) (suggesting "that a modification of the terms of an existing obligation may constitute . . . new value . . . '[t]o the extent that a creditor can demonstrate that its agreement to modify the terms of the debtor's obligation

gave the debtor money or money's worth in new credit, goods, services or property'" (citations omitted)). So even if the $250,000 transfer preceded the $249,900 payment, the Defendant has not shown conclusively, for purposes of summary judgment, that it can avail itself of §547(c)(4). See 11 U.S.C. §547(g) ("[T]he creditor . . . has the burden of proving the nonavoidablity of a transfer under" §547(c)(4).).

**SUMMARY**

There is no merit to the Defendant's contention that the $250,000 payment at issue was not a transfer for purposes of §547(b). The Defendant also did not establish that it can utilize the new-value defense afforded by §547(c)(4). Its motion for partial summary judgment will therefore be denied.

Dated: March 25, 1996

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ARTHUR J. SPECTOR
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
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-v- A.P. No. 94-3179

W.P.M., INC.,

Defendant.
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**ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

For the reasons stated in the opinion of even date,

**IT IS ORDERED** that the Defendant's Motion For Partial Summary Judgment, filed March 7, 1996, is denied.

Dated: March 25, 1996

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ARTHUR J. SPECTOR
U.S. Bankruptcy Judge